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Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

No. 842 -

HERMAN EUGENE WING,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent

PETITION FOR WRIT OF CERTIORARI

JAMES E. FRASIER and
THOMAS G. HANLON
Tulsa, Oklahoma

Attorneys for Petitioner

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In The
SUPREME COURT OF THE UNITED STATES

No. _____

HERMAN EUGENE WING,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent

PETITION FOR WRIT OF CERTIORARI

Your petitioner, Herman Eugene Wing, prays that a writ of certiorari issue to review judgment of the Supreme Court of the State of Missouri entered in the above entitled cause on July 13, 1970.

OPINIONS BELOW

The judgment of the Circuit Court of Newton County, Missouri, is not reported. The opinion of the Supreme Court of Missouri as reported at _____, Missouri _____

JURISDICTION

The judgment of the Supreme Court of Missouri was entered on May 11, 1970; that the Petitioner filed his pe-

tition for re-hearing on the judgment and sentence rendered against him on the 11th day of May, 1970, which was heard and overruled by the Supreme Court of Missouri on July 13, 1970. The jurisdiction of this Court is envoked under *Title 28 U.S.C.A., Section 1257-3 and the Rules of the Supreme Court, Rule 19.*

QUESTIONS PRESENTED

1. Was the trial court in error in allowing evidence to be introduced over the objections of the Petitioner, which evidence was in violation of Petitioner's rights afforded him under the 14th and 4th Amendments of the United States Constitution.

2. Was evidence of an attempted burglary of the bank of Seligman, Missouri, not connected to this Defendant, so prejudicial to the rights of the Defendant to go beyond the purposes of the prosecution of throwing light upon intent but was intended to and did create in the minds of the jury guilty and prejudicial thoughts to deprive this Defendant of a fair and impartial trial.

STATEMENT OF FACTS

During the early morning hours of July 18, 1968, banker Clyde Mitchell at Seligman in Barry County, Missouri, received a telephone call that something unusual was going on at the Bank of Seligman (T. 39, 40). He loaded two guns, called the Barry County Sheriff's Office at Cassville, got into his automobile and drove near the bank where he saw a man standing in front of the bank building proper (T. 41). Mitchell drove down onto Highway 37 which runs north and south in front of the bank, headed north on the highway, drove back in front of the

bank where he saw two men, one standing on concrete flower boxes stacked on top of each other and the other standing beside the boxes (T. 41). There was a light bulb directly inside the building and a street light across the street and a little north from the front of the bank. Banker Mitchell then drove to the north end of town where he picked up his brother-in-law, Fred Preston, and together they drove back to the front of the bank stopping their automobile across Highway 37. They got out of their car and "hollered" something like "give up" at the two men (T. 43, L. 14-24). The men ran away (T. 44, L. 17), down into the railroad bed and Mitchell and Preston did not see them again (T. 45, L. 3). Mitchell could not identify the defendant as one of the men at the bank (T. 46, L. 1-5), nor could Preston (T. 45, L. 20; T. 47-51). A sledge hammer, wrecking bar, and pliers were left at the bank (T. 46, L. 1-5). A sixteen year old boy, William Allen Moran, who lived near the bank, went out of his house to take a walk about 1:30 or 2:30 in the morning and saw the two men at the bank, spoke to them, received no reply, and walked on off (T. 55, L. 18-20). Moran could not identify the face or features of the defendant as one of the two men although the defendant was the same size as one of the men (T. 61, L. 20-23; T. 62, L. 1-4). Sheriff Hemphill, in response to Mitchell's call, drove to the Seligman Bank in the early morning hours and saw the tools at the bank (T. 64, L. 17, 18). He drove around the City of Seligman, its alleys and streets (T. 66, L. 4, 5). He found a 1968 Pontiac Grand Prix Bonneville automobile parked on the old school lot (T. 66, L. 20-25). No one was in the car, and the sheriff shined a flashlight in it, saw the key, opened the door and took the key (T. 67, L. 6-9). The car bore Oklahoma license plates (T. 67, L.

18-22). The Sheriff locked the car and had it towed to Cassville (T. 69, L. 21, 25; T. 70, L. 1-2). Later that day he searched the car under a search warrant issued out of the Magistrate Court of Barry County (T. 70, L. 18, 25; T. 70, L. 1-8). Items and instruments introduced in evidence and claimed to be unlawfully possessed by Defendant were taken from the trunk of the car in that search. Young Moran, after speaking to the two men at the bank, had returned to his house, looked out the window, saw a car driven up and the two men get into it. The car left the vicinity of the bank with the two men for two or three minutes, then returned. The two men got out, and the car was driven off by a third man (T. 57, L. 17, 22). Moran, on the witness stand, described this car as a Blue 1968 Pontiac Grand Prix with Oklahoma license plates (T. 57, L. 24, 25) but according to F.B.I. Agent Mitchell, whose testimony was stipulated, Moran was unable to give the make of the car the next day (T. 135, L. 10-18). In the search of the car, the Sheriff found an Oklahoma car title issued to Herman Eugene Wing. This title was to the 1968 Pontiac Bonneville. A 1968 application for the automobile registration dated December 14, 1967, bearing the signature Herman Eugene Wing, was also found in the search (T. 78, L. 8-9). Welding equipment, a plastic hose, blanket, pipe and other items, claimed by the State to be nefarious, were taken from the trunk.

After returning to Cassville, Hemphill obtained photographs of Herman Eugene Wing and gave one to his deputy, Wilbert Shockley. Shockley, later in the day, was at his sister's home in Washburn, Missouri (T. 104, L. 19), about six miles from Seligman. *About 8:45 in the evening, eighteen or nineteen hours after the car was found,* Shock-

ley saw a man sitting in a ditch along the highway just North of his sister's house (T. 105, L. 25; T. 106, L. 1). The deputy approached the man with drawn pistol, commanded him not to move, and called the Sheriff by car radio. The Sheriff came, and the Defendant, who was the man sitting in the ditch, was taken in custody. Sometime after his arrest, the defendant in writing authorized the Sheriff to release the Pontiac car to his, the Defendant's, wife. At the trial the Sheriff identified a photograph which was attached to Exhibit 33, as being that of the defendant, and testified that he read on the F.B.I. sheet that the defendant had been convicted in Oklahoma (T. 119, L. 11). Prior to the trial, the defendant moved to suppress the evidence seized by the Sheriff (T. 5, 6). The Circuit Judge of Barry County heard the Motion, and took it under advisement (T. 7, L. 19-22). Thereafter, an application for disqualifation of the Judge and a change of venue was filed by the defendant, and the Motion to Suppress was overruled and the Application for Disqualification and Change of Venue were sustained and the cause was transferred to Newton County (T. 8, L. 1-5).

That as a result of the search of the defendant's car, he was charged in the U. S. District Court styled U.S. v. Herman Eugene Wing, United States District Court, Western District of Missouri, Southwestern Division, case #2592 with the crime of "attempted bank burglary, and in U. S. v. Herman Eugene Wing, case #2596, all in violation of Sections 902 and 905 of Title 15 U. S. Code and further charged in State of Missouri v. Herman Eugene Wing, in the District Court of Newton County, case CR 1660, with the crime of "possession of burglary tools". On the 20th day of December, 1968, the Defendant was acquitted in

U.S. District Court, case #2592 by the Honorable Judge Elmo Hunter who sustained the Defendant's motion for judgment of acquittal on the insufficiency of the evidence, the Defendant was then tried in the State of Missouri case at bar wherein he was found guilty and was thereafter tried in the U.S. District Court for possession of firearms wherein he was acquitted, on the ___ day of June, 1969. In the case at bar, the Defendant was found guilty from which judgment and sentence he is appealing to this Honorable Court.

PROPOSITION I

THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE TAKEN FROM THE AUTOMOBILE BECAUSE THE SEARCH WARRANT WAS ISSUED ILLEGALLY IN THAT THE COMPLAINT FOR SEARCH WARRANT FAILED TO PROPERLY SHOW PROBABLE CAUSE FOR ITS ISSUANCE AND WAS ILLEGALLY ISSUED.

The Court erred in overruling Defendant's motion to suppress the evidence in chief taken from the Defendant's automobile by Sheriff Hemphill on a search warrant, Complaint for Search Warrant, which is the affidavit upon which the Search Warrant was based and states:

> That the affiant, Joe R. Ellis, then Prosecuting Attorney of Barry County, Missouri, "has reason to believe" that burglary tools were concealed in the Pontiac automobile, which "are believed to have been used in the burglary of the Bank of Seligman". The affidavit states that the affiant "believes" that the automobile is the property of Herman Eugene Wing, the known

bank burglar, that the automobile was found parked in the area where the burglary was committed on July 18, 1968, immediately after the burglary was committed, that the automobile appears to be abandoned and diligent efforts to locate the owner or driver has failed, it bears Oklahoma license, that shots were exchanged during the burglary and the persons committing the burglary fled on foot.

It should be noted at this point that the Affidavit which is set forth above had already been introduced into the Petitioner's trial of U. S. v. Herman Eugene Wing, No. 2592 in which a motion to suppress was filed by the Petitioner's attorney wherein it was the contention of the petitioner that the affidavit was insufficient as a matter of law and that the subsequent issuance of a search warrant on said affidavit was contrary to the petitioner's constitutional rights. This position was sustained by an order signed by the Honorable Elmo Hunter, U. S. District Judge for the Western District of Missouri. Said order and opinion was introduced into evidence at the hearing on the motion to suppress in the above entitled cause and is part of the record herein. It has heretofore been the practice to follow the interpretation and construction of the Federal Courts in construing the laws of searches and seizures. As far back as 1924 it was stated in *Owens v. State*, (Mo.) 256 S. W. 100:

> "While the Fourth & Fifth Amendments to the Federal Constitution are not involved here, Sections 11 and 23, Article 2, of the Constitution of Missouri are almost identical in purport and in language with those amendments, and the construction of them by the United States Courts is important authority for us in construing the like sections of our State Constitution. In considering the weight of authority more effect

should be given to the United States Courts than to the Courts of any state, and perhaps to the Courts of all the states: not merely because the United States Supreme Court is the highest authority but for other reasons. The Federal Rule is the result of years of mature consideration, during which the question at issue was before the Federal Courts under varying circumstances of fact, so that it has been tested and applied to nearly all conceivable conditions, Section 11, Article 2 of our Constitution is almost identical in language and exactly identical in purport with the Fourth Amendment to the Federal Constitution. The construction of that section by the Federal Constitution is, therefore, of the highest authority."

We therefore submit that the search warrant was issued illegally in that it was issued on an affidavit which was insufficient as a matter of law. The affidavit was based on information and belief and hearsay, and did not show sufficient facts for the issuance of a search warrant by the magistrate. This was in violation of the Defendant's constitutional rights afforded him under the Constitution of the State of Missouri, Article I, Section 15 and the 4th and 14th Amendments of the United States Constitution and in violation of Rule 33.01 (a) (2), Missouri Supreme Court Rules of Criminal Procedure. The motion is proper procedure under Rule 33.03 (a) (2).

In addition, timely objections were made at the trial to the introduction of the evidence which was the result of the seizure (T. 71, 72).

There are three questions to test the validity of search in the case at bar; 1: Does the Defendant have sufficient possessory interest in the articles searched to attack the validity of said search? 2: Does the affidavit for the search

warrant in said cause show there is probable cause for believing the existence of the grounds on which warrant should issue? and, 3: Was the warrant legally issued on the basis of the aforementioned affidavit? As to the first question, the Defendant as the registered owner of the vehicle searched has standing to complain of the illegality of its search. *Matthews v. Corea*, 135 F. 2d 534; *U.S. v. Fowler*, 17 FRD 499.

The second and third questions testing the validity of the affidavit and issuance of the warrant should be considered together, as both the making of the affidavit and the issuance of the warrant usually occur simultaneously and one entails the other. The questions to be raised is whether sufficient evidence to establish probable cause to search was put before the Magistrate by Prosecuting Attorney, Joe Ellis, who applied for the search warrant for the appellant's automobile. The sole evidence upon which the warrant was issued was on an affidavit signed by Joe Ellis.

As set forth in *Siden v. U. S.*, 92 F. 2d 241; *Kevin v. U. S.*, 5 F. 2d 282, and *Poldo v. U. S.*, 55 F. 2d 866, since the warrant is required to be issued only upon writing and sworn to, that is, an affidavit, the sufficiency of the warrant as to probable cause is to be determined solely with reference to the warrant and supporting affidavit.

In *Baysden v. United States*, 271 F. 2d 325, it is stated as follows:

> "A search warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant, and that if the judge or commissioner is satisfied that grounds for the application exist, or that there is probable cause

> to believe that they exist, he shall issue a warrant identifying the property and the person or place to be searched. It is also provided that the warrant shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits had been taken in support thereof."

In the case at bar, the Prosecuting Attorney simply makes a statement that "he has reason to believe" that burglary tools were in the car owned by the Appellant Wing. He did not place any supporting affidavit before the Commissioner with which to verify his statement; he did not name any informant from which his information was procured and he did not state or show in his affidavit that the source from which he procured his information was reliable. The whole affidavit purports to say in short form that it is under his belief and the rest of the supporting facts in the affidavit are no more than mere conclusions

In *State v. Lock*, 259 S. W. 121, it is declared that if no statement of fact is stated therein, from which probable cause may legally be inferred, the Constitution and Defendant's rights, thereunder, have been violated and the verified statement contains no statement of fact. It sets forth no fact or circumstance whereby the magistrate may determine the probable cause. The statement in the *Lock* case is:

> "I, J. P. Smith, procuting attorney,—state that I verily believe that in the building known as the residence, etc.—and further as affiant verily believes that in said building, etc. and a place in which intoxicating liquors are manufactured as affiant verily believes contrary, etc,——"

From the above statement probable cause may not be judicially found. The affiant gives no reason for his belief, nor does he support, verify, or substantiate it, establishing the existence or truth of any fact or circumstance, by proof or competent evidence. The statement is that he verily believes certain things contraband by statute are on the farm of defendant Bill Lock; and if he verily believed it, unfounded his belief may have been, no fact appears in the statement that would subject him to legal responsibility.

As stated in *Byars v. United States*, 47 S. Ct. 248:

> "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed."

The appellant is aware of rules set down in *Jones v. U.S.*, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697, supporting the fact that a warrant may be issued upon hearsay information, but it also holds that the affiant must set forth from whom he received the information and also the validity and reliability from which it came. In the case at bar the affiant fails to inform the Magistrate as to the validity or reliability of his information. Mere suspicions of appellant's guilt seem derived entirely from information given him by law enforcement officers and other persons in Cassville, Missouri, none of whom appeared or submitted affidavits. Rule 33.01 (a) (2), Rules

of Criminal Procedure, provides in part that the warrant shall state "such facts positively and not on information and belief" for its issuance or upon "written affidavits" taken in support thereof. The complaint did neither and is invalid.

The protection afforded by such rules when they are viewed against their Constitutional background is that the inferences from the facts which lead to the issuance of a search warrant be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Johnson v. U. S.*, 333 U. S. 10, 92 L. Ed. 436, 68 S. Ct. 367. The purpose of the affidavit was to enable the Magistrate to determine whether the "probable cause" required to support the issuance of a search warrant existed. It was incumbent upon the Magistrate to judge for himself the persuasiveness of the facts relied upon by a complaining agent to show probable cause, and not to accept without question the agent's mere conclusion that the articles sought were in a motor vehicle and issue a warrant on these conclusions. *Giordenello v. U. S.*, 357 U. S. 480, 78 S. Ct. 1245, 2 L. Ed. 2d 1503.

In the enforcement of this safeguard against unlawful searches and seizures, it is generally held that a search warrant should not be issued upon the affidavit of a government officer which merely shows that he is in possession of information which gives him cause to believe that the accused is in possession of property in violation of the criminal law on the premises described in the warrant without revealing the sources of his information or the grounds of his belief. *Byars v. U. S.*, 273 U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520; *Nathanson v. U. S.*, 290 U. S. 41, 54 S. Ct. 11, 78 L. Ed. 159; *Spinelli v. U.S.*, 21 L. Ed. 2d

637, 89 S. Ct. —; *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723.

A search warrant may not properly issue "upon mere affirmance of suspicion or belief without disclosure of supporting facts and circumstances." *Nathanson v. U. S., supra.*

We therefore submit that the affidavit in the case at bar was not sufficient to allow the issuance of a search warrant because the Prosecuting Attorney did not reveal his source of information or grounds of his belief of same, and there was not sufficient evidence in said affidavit to show "probable cause" that a warrant should issue.

PROPOSITION II

THE COURT ERRED IN ADMITTING EVIDENCE OF THE ATTEMPTED BURGLARY OF THE BANK OF SELIGMAN, MISSOURI, AS IT WAS SO PREJUDICIAL TO THE RIGHTS OF THE DEFENDANT TO GO BEYOND THE PURPOSE OF THE PROSECUTION OF THROWING LIGHT UPON INTENT BUT WAS INTENDED TO AND DID CREATE IN THE MINDS OF THE JURY GUILTY AND PREJUDICIAL THOUGHTS TO DEPRIVE THIS DEFENDANT OF A FAIR AND IMPARTIAL TRIAL.

Again it should be noted that in U. S. v. Herman Eugene Wing, U. S. District Court for the Western District of Missouri, Southwestern Division, case #2592, the identical facts and conditions were presented to the Court as the case at bar and on the 20th day of December, 1968, the Honorable Elmo Hunter sustained the Defendant's motion for judgment and acquittal stating as shown in the appendum, page 2:

> "It is a fundamental principle of our criminal law that the guilt of a defendant must be established beyond a reasonable doubt, and that the verdict must be based upon substantial evidence. Substantial evidence is more than a scintilla. It means such relevant evidence as a reasonable mind might accept to support a conclusion. It is evidence affording a substantial basis of fact from which the fact in issue can be reasonably inferred. See: United States v. Martin, 375 F. 2d 956 (6th Cir. 1967)."
>
> The finding of the automobile of one of the defendants some 1,000 feet from the bank, a physical similarity between the burglars and the defendants, and the apprehension of the defendants which two and one-half and eight miles of the bank is not sufficient evidence to permit or support a finding beyond a reasonable doubt that the defendants were guilty of the burglary.
>
> Since the evidence is not sufficient to make a submissible case, and since it is not sufficient to support a finding of guilt beyond a reasonable doubt, the motion for judgment of acquittal is hereby sustained as to both defendants, and judgment is hereby entered for the defendants, Ernest L. Edmondson and Herman E. Wing, and against the United States of America.

Appellant is aware of the rules announced in *State v. Heflin*, 89 S. W. 2d 938 and similar cases. In the *Heflin* case, they were allowed to show that Heflin had just committed a robbery and was fleeing with the spoils. In the case at bar, it was admitted over objection by the Appellant, and a mistrial sought (T. 29, 33, 36, 37, 49, 50 and 65), that there had been an attempted burglary on the bank of Seligman, Missouri. Throughout all of the evidence in the case at bar, the Prosecuting Attorney did his utmost to

interpret and infer that the Appellant was one of those who attempted to burglarize the bank. But there is not a scintilla of evidence to show that Appellant attempted to burglarize the bank nor were any witnesses produced that could identify him as being one of the persons who attempted to burglarize the bank. This was interjected wholly for the purpose of inflaming the minds of the jurors so that they lost the complete issue before them and the attempted bank burglary was placed in issue in its stead. This was unduly prejudicial to the right of the Appellant to have a fair trial under the prevailing conditions.

The State is not permitted by means of insinuation or innuendo to plant in the minds of the jurors a prejudicial belief in the existence of evidence which is otherwise not admissible and thereby prevents Appellant from having a fair trial. In the case at bar, again and not to be redundant, the evidence of the attempted burglary of the Seligman Bank was offered into evidence over the repeated objections of the Appellant (T. 38, 39, 50, 51, 54, 64, 65, 130, 131) and after all evidence was in there was not a scintilla of evidence to connect the Appellant with the attempted bank burglary. To allow such testimony was error. As stated in *Sanden v. U. S.*, 206 F. 2d 86:

> "Where evidence which is so prejudicial to an accused is erroneously admitted and cannot with reasonable certainty be shown that the harm has been undone, the conviction must be reversed."

In *Fishwich v. U. S.*, 67 S. Ct. 224, 329 U. S. 211, 91 L. Ed. 196:

> "If an error in a criminal case has substantial influence on the result or if there is doubt about it, the

conviction cannot stand even if supported by the evidence."

The testimony for determining whether error is prejudicial is set out *in Kotteakos v. U. S.*, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1559:

"The error is prejudicial unless the reviewing court can say with assurance that the judgment by the jury was not swayed by the error."

As stated in *U. S. v. Dresser*, 112 F. 2d 972:

"It is inconsistent without traditional conception of a fair trial to permit any information to go to a jury which might influence a jury to convict a defendant for any reason other than that he is guilty of the specific offense with which he is charged."

"In the trial of a criminal case, a high and important duty and responsibility are imposed on the prosecuting attorney. It is his duty to see that the Government's case is properly presented with earnest and vigor, and to use every legitimate means to bring about a just conviction but he has the duty to refrain from improper methods calculated to produce a wrongful condition and while he may strike hard blows he may not strike foul ones.'

As stated in *Berger v. U. S.*, 55 S. Ct. 629, 295 U. S. 78, 79 L. Ed. 1314:

"A Defendant accused of crime is entitled to a fair and impartial trial."

It is the Defendant's contention that the introduction of evidence as to the attempted burglary of the Bank of Seligman is the sole purpose of prejudicing and denying the Defendant a fair and impartial trial as provided by the Constitution of the United States.

CONCLUSION

For the foregoing reasons it is respectfully prayed that this Court grant this petition for writ of certiorari.

Respectfully submitted,

JAMES E. FRASIER and
THOMAS G. HANLON
Tulsa, Oklahoma
Attorneys for Petitioner

APPENDIX

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER ONE

Filed on May 11, 1970, in Office of Clerk of Supreme Court.

No. 54,822

STATE OF MISSOURI, Respondent,

vs.

HERMAN EUGENE WING, Appellant.

Appeal from the Circuit Court of Newton County
The Honorable Paul E. Carver, Judge

Herman Eugene Wing was charged by information in Barry County with possession of burglar's tools. Upon change of venue to Newton County, a jury convicted him of that offense and assessed his punishment at 10 years' imprisonment. Sentence and judgment were rendered accordingly. Section 560.115, V.A.M.S.

Appellant's first attack goes to the sufficiency of the complaint upon which the Magistrate County of Barry County issued a search warrant and pursuant to which many of the exhibits in evidence were found and seized. The complaint for search warrant was made July 18, 1968, upon the oath of Joe R. Ellis, Prosecuting Attorney of Barry County: "* * * that he had reason to believe that on the premises known as one 1968 model, two door, Pontiac, Automobile, Grand Prix model, Serial Number 266578R107539, in the county of Barry, State of Missouri, at 101 East Eighth Street, Cassville, Missouri, there is now being concealed certain property, to-wit: burglary tools which are believed to have been used in the burglary of the Bank of Seligman, Missouri, a corporation, which was feloniously and forcibly broken and entered, the same be-

ing a building where money and valuable things were kept with intent said money and valuable things then and there being found to steal on this 18th day of July, 1968, and affiant further believes that the automobile aforesaid is the property of Herman Eugene Wing, Bartlesville, Oklahoma, a known bank burglar and that said vehicle was used in the burglary aforesaid.

"Affiant states that the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows: That the automobile is legally registered to Herman Eugene Wing, a known bank burglar; that the automobile was found parked in the area where the burglary aforesaid was committed on July 18, 1968, immediately after the burglary was committed; that the said automobile appears to be abandoned and that diligent efforts to locate the owner or driver thereof have failed; that said automobile bears an Oklahoma license; that during the course of the burglary aforesaid shots were exchanged by persons committing said burglary and Clyde Mitchell, President of said Bank, and that the said persons committing the burglary fled on foot."

Appellant contends, Points I and II, that the court erred in overruling his motion to suppress evidence taken from the automobile pursuant to the warrant and in admitting the same at trial, alleging that the search warrant was illegally issued in that the complaint upon which it was issued failed to show probable cause. The dispositive question of both points is the sufficiency of the complaint. Appellant's argument is that the prosecutor's complaint "was based on information and belief and hearsay, and did not show sufficient facts for the issuance of a search warrant by the magistrate," and that he did not reveal the source of his information and belief. Appellant's citations are representative of several familiar principles bearing on a determination of sufficiency of a complaint for search warrant, e.g., Siden v. United States, 9 F. 2d 241, Kirvin v. United States, 5 F. 2d 282, and Poldo v. United

States, 55 F. 2d 886, that probable cause is to be determined from the complaint, and, if filed, supporting affidavits; Baysden v. United States, 271 F. 2d 325, that the warrant shall issue only on affidavit establishing grounds for issuance; Byars v. United States, 273 U.S. 28, that a violative search cannot be made lawful by the success of the search; Jones v. United States, 362 U. S. 257, that a warrant may issue upon hearsay if the affiant sets forth the source, validity, and reliability of his information; Nathanson v. United States, 290 U.S. 41, Spinelli v. United States, 393 U. S. 410, and Aguilar v. Texas, 378 U. S. 108, that a warrant should not issue upon affidavit of an official which merely shows he is in possession of information which causes him to believe the suspect is in possession of property without revealing the source of his information.

The complaint in this case was consistent with these authorities. Criminal Rule 33.01, V.A.M.R., provides: "(a) If a complaint in writing be filed with the judge or magistrate of any court having original jurisdiction to try criminal offenses stating that personal property * * *, the seizure of which under search warrant is * * * authorized * * *, is being held or kept at any place or in any * * * car, * * * motor vehicle, * * * within the territorial jurisdiction of such judge or magistrate, and if such complaint be verified by the oath or affirmation of the complainant and states such facts positively and not upon information or belief; or if the same be supported by written affidavits verified by oath or affirmation stating evidential facts from which such judge or magistrate determines the existence of probable cause, then such judge or magistrate shall issue a search warrant * * * to search the place therein described and to seize and bring before such judge or magistrate the personal property therein described." It is noted that this rule provides two situations in which a search warrant shall issue: The first exists upon the filing of a complaint, verified by oath,

which states facts positively and not upon information or belief; the second exists when the complaint is supported by written affidavits stating evidential facts from which the judge determined probable cause. "In the first situation, the verified statement of positive facts empowers the court to issue the search warrant; in the second, the court determines probable cause for issuance of the warrant from the facts contained in the complaint and from the affidavits or other evidence submitted to support the complaint." State v. Taylor, 391 S.W. 2d 929, 932. These situations were demonstrated in State v. Lock, Mo., 259 S.W. 116, where the complaint for search warrant reads: "'I, J. P. Smith, prosecuting attorney * * * state that I verily believe that in the building known as the residence, etc., * * * and further as affiant verily believes that in said building, etc.; * * * and a place in which intoxicating liquors are manufactured as affiant verily believes contrary, etc. * * *.'" 259 S. W. l. c. 121[4]. It is apparent that this complaint would fall into the second situation and its insufficiency is equally apparent in that "probable cause may not be judicially found. The affiant gives no reason for his belief, nor does he support, verify, or substantiate it, establishing the existence or truth of any fact or circumstance, by proof or competent evidence. The statement is that he verily believes certain things * * * and if he verily believed it, however unfounded his belief may have been, no fact appears in the statement that would subject him to legal responsibility." 259 S. W. l.c. 121[4]. The court also stated, however, that upon looking to the prosecutor's sworn statement as the only document in support of probable cause, "if it contains any statement of fact from which probable cause may be inferred, it complies with the Constitution. If no statement of fact is stated therein, from which probable cause may legally be inferred, * * * defendant's rights * * * have been violated." 259 S.W. l.c., 121[4].

Application of this test to, and comparison of, Mr. Ellis's complaint, shows, by contrast, its sufficiency and demonstrates that appellant's argument fails to accord credence to all of the complaint. The magistrate judge was entitled to "a common-sense reading of the entire affidavit," Spinelli v. United States, supra, 393 U. S. l.c. 415; and such a reading, together with the suggested test and contrast, shows failure by appellant to distinguish between separate portions of the complaint and between allegations of belief and fact within separate portions of the complaint. The first paragraph of the complaint alleges affiant's reason to believe that burglary tools believed to have been used in a burglary are in an automobile believed to have been used in a burglary and owned by Herman Wing. That paragraph also contains statements of positive fact, i.e., description of a specific automobile; that it was at a specific place in Cassville, Barry County, Missouri; that the Bank of Seligman in Barry County was burglarized July 18, 1968; that Wing was a known bank burglar. The second paragraph consists entirely of statements of positive fact, i.e., that the specific automobile was registered to Wing; that he was a known bank burglar; that the specific automobile was found parked in the area where, and immediately after, the specified burglary was committed July 18, 1968; that it appeared abandoned; that efforts to locate the owner had failed; that it bore Oklahoma license plates; that shots were fired by the burglars in the course of the specified burglary; that the persons committing the burglary fled on foot.

With such statements of positive facts, as opposed to belief and hearsay, the court had sufficient evidential facts from which to find probable cause, as opposed to a prima facie case, without the necessity of supporting affidavits. State v. Taylor, supra, 391 S.W. 2d l.c. 932[1, 2]; Spinelli United States, supra, 393 U. S. l.c. 419; Beck v. Ohio, 379 U. S. 89, 96.

Clyde G. Mitchell, Vice President of the Bank of Seligman, received a telephone call in the early morning of July 18, 1968. In response to the call he loaded two guns, called the sheriff's office, and drove to the bank located on the east side of Highway 37, a north-south main road in and through Seligman. When he drove in front of the bank he saw two men, "One was standing on concrete flower boxes up there and the other man was standing beside the boxes as if steadying him." The man on the boxes "was up there where the burglar alarm system is. * * * It was not sounding." Mr. Mitchell decided he needed help and drove on to the home of his brother-in-law, Fred Preston. Mr. Preston, upon being awakened, got up, secured a weapon, and accompanied Mr. Mitchell back to the bank. The men were still in the position in which Mr. Mitchell had last seen them. Mr. Mitchell stopped his car on the west side of the street. "We hollered across at them * * * something about 'give up' or——." The men did not give up but "left on foot, running." They ran north about 50 feet, turned east past an office building and down into an old railroad bed. Mr. Mitchell and Mr. Preston lost sight of them. As to identification of the men, "The one on the sidewalk that was doing the steadying, he had on what appeared to be * * * overalls or might have been coveralls, but whenever he drew his pistol you could see it was not jeans or something that fit tightly. * * * The other man was dressed in jeans like that, khakis, or something and we could tell, when running up the street, that he didn't have on an ordinary pair of shoes * * * more of a hightop boot thing." When the men fled from the bank they left a "sledge hammer laying underneath the burglar alarm system, a wrecking bar lying there. There was a wrecking bar inside the bank premises and also a pair of large pliers * * * adjustable pliers." Mr. Preston's testimony was corroborative of that of Mr. Mitchell.

William Allen Moran, age 16, lived in Seligman a few doors from the bank. Around 1:30 or 2:30 a.m., July 18, 1968, he had been home "eating a pizza. I was going to walk a little of it off. I went out the back door and got to the corner of the building, there was two men standing beside it as you go in, and I said 'Hi' to them. They would say nothing so I turned and walked off slow, but not real slow." The men were "right behind the bank, by the window" at the east end of the bank, about three feet from the door. As to identifcation, "The tallest one was wearing green overalls, and the shorter on was wearing a white shirt with overalls. * * * I went the other direction over to a neighbor's trailer. My mom was out there and I told her and she went in and called, and I stood out behind. * * * The taller one had a pick or something working on the bank door, beating on it a little * * *." Asked if he could identify the defendant, Mr. Moran answered, "In the physical ability. * * * Shorter one was heavyset, not real heavyset." He was the shorter of the two. After telling his mother of his observations he "went to the front window a little while, they come up and stood in front a little while and they got in a car and drove to the south, two or three minutes, and turned back and parked straight across from my house. Two of them got out of the car, one in the back seat got out of the back seat, and the third one drove off." They were the same two he had seen on foot earlier. The car was a "Blue '68 Grand Prix, with long sloping back glass, had Oklahoma license plates on it." He later observed the car driven by Mr. Mitchell and with Mr. Preston as passenger, after which he no longer saw the men he had observed get out of the car.

Sheriff Bill Hemphill received the call from Mr. Mitchell about 2:10 a.m., July 18, 1968. He went immediately to the bank. Deputy Sheriff Abe Dummitt preceded him. "I drove up and stopped in front of the bank and I seen a bunch of tools laying out in front of it * * *. I started

looking for a car that had been used by the burglars." About ten minutes later he found a 1968 Pontiac Grand Prix Bonneville "southwest of the Seligman Bank about a thousand feet in what is known as the old school-ground, used to be a school-ground but it burned down." It was off the traveled thoroughfare. He looked into the car with his flashlight, took the keys which were left in it, locked it, noted the car number and 1968 Oklahoma license plates. He had the car towed to Cassville and later in the presence of Joe Ellis and some of his deputies, searched the car pursuant to a warrant issued by the magistrate court upon complaint of Joe Ellis, the prosecutor. There was a shotgun in the front seat; the other items seized by the sheriff were in the trunk. Among the items taken were two 50-foot lengths of green plastic garden hose, rifle case, acetylene igniter, tip cleaner, cutting tip, regulator, oxygen and acetylene gauges, bottle of oxygen, two lengths of pipe, welder's goggles and gloves, duffel bag, shoes, blanket, Oklahoma title to a 1968 Pontiac Bonneville issued to Herman Eugene Wing, excise tax receipt and application for Oklahoma registration in the name of Herman Eugene Wing, and a 6-inch crescent wrench. Sheriff Hemphill was given written permission by appellant "to release this 1968 Pontiac to Eugene Wing's wife." He described the manner in which the tools seized could be used to commit a burglary and how hoses are used to run water over a safe while cutting it and the blanket could be used to cover a window. The shotgun could be used to stand off an officer who might arrive at a burglary scene. Sheriff Hemphill had known defendant as a rodeo calf roper and also had pictures of him in his official files. He knew also "that he had done two terms in the penitentiary on burglary." He gave a picture of defendant to his deputy, Wilbert Shockley. Sheriff Hemphill identified a photograph attached to Exhibit 33 as being that of defendant, and he read an F.B.I. sheet that defendant had been convicted of a burglary in Oklahoma.

Mr. Shockley took part in a manhunt in the Wash-

burn-Seligman communities July 18, 1968. Around 8:45 p.m., July 18, 1968, while still daylight, he was at his sister's home in Washburn, also on Highway 37 about six miles from Seligman. "I saw this fellow sitting in a ditch along Highway 37 just north of my sister's house." He was in a "squatting position"; the ditch was about three feet deep with weeds "probably a foot high." The man proved to be defendant and Deputy Shockley arrested him.

William C. Baker, a former employee of the Bartlesville, Oklahoma, Police Department, stated that in July, 1968, he was acquainted with defendant and had had special duties in connection with surveillance of defendant.

Defendant's case consisted of the reading of a stipulation that a day or so following July 18, 1968, F.B.I. Agent Mitchell interviewed witness Moran in connection with the attempted burglary of the Bank of Seligman, and that witness Moran told the agent that the automobile he had seen July 18, 1968, was a "blue 1968 car, make unknown, with long sloping back windows."

Appellant makes several charges of error with respect to the admission of some of the stated evidence. Under Point IV, he complains of the admission of state's Exhibit 33 into evidence on the theory it went beyond any legitimate or relevant purpose of "throwing light upon intent"; under Point XII he complains of inflammatory and prejudicial actions in admission of testimony from witness Baker that defendant was under surveillance, of evidence of an "attempted" burglary of the Bank of Seligman, of evidence of a "shoot-out," of admission and later withdrawal of a shotgun; under Point V he complains that evidence of the "attempted" burglary of the Bank of Seligman was irrelevant, had no tendency to establish his guilt, did not tend to establish identity, and was unduly prejudicial; and under Point VI he complains that testimony admitted from witnesses Mitchell, Pierson and Moran was not relevant, did not connect defendant with the offense on trial and was unduly prejudicial.

Appellant's argument is that these matters involved unrelated and far removed crimes, and that they placed defendant's character in issue even though he did not take the stand, all to his prejudice. See United States v. Sansone, 206 F. 2d 86; Fiswick v. United States, 329 U. S. 211; Kotteakos v. United States, 328 U. S. 750; United States v. Dressler, 112 F. 2d 972; Greer v. United States, 245 U. S. 559; Berger v. United States, 295 U. S. 78; Boyd v. United States, 142 U. S. 458.

Appellant concedes in his citation of State v. Hefflin, Mo., 89 S.W. 2d 938, 945[12], that a prosecution for possession of burglar's tools requires proof of a criminal intent upon the part of the possessor to use them burglariously or for some criminal purpose. See also State v. Medley, Mo., 232 S. W. 2d 519, 524[5][7]. It is also established that although proof of commission of separate crimes is generally not admissible, such proof is admissible if it " 'has some legitimate tendency to directly establish the defendant's guilt of the charge for which he is on trial * * *.' 'Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motives; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related that proof of one tends to establish the other; (5) the identity of the person charged with the commission of the crime on trial.' " State v. Reese, Mo., 274 S.W. 2d 304, 307; State v. Allen, Mo., 442 S.W. 2d 18, 19.

Application of these rules to appellant's complaints shows that the evidence in question was not received in error in this case. State's Exhibit 33, said to be irrelevant, was a copy of Oklahoma state penitentiary records showing two prior burglary convictions. The exhibit and what it showed were not inadmissible because, although evidence of related crimes, they tended to show defendant's unlawful intent in his possession of burglar's tools. It has been recognized that such intent may be shown by proof

of the defendant's reputation as a burglar, State v. Watson, Mo., 386 S.W. 2d 24, 29-30[6-10]; State v. Caffey, Mo., 436 S.W. 2d 1, 3[2]; or that he was an associate of burglars, State v. Lorts, Mo., 269 S.W. 2d 88, 91[5], State v. Watson, supra; and that such intent may also be shown by defendant's previous conviction of similar crimes, State v. Young, Mo., 425 S.W. 2d 177, 182[8].

By analogy, evidence of the burglary or attempted burglary of the Bank of Seligman was proper and relevant on the intent with which the tools were possessed and on identity. State v. Reese, supra; State v. Allen, supra.

Appellant's Point VII is a further complaint on the court's rulings in admitting the prior convictions in evidence. His contention is that the court failed to fully instruct the jury on "all questions of the law necessary to their guidance," Criminal Rule 26.02, V.A.M.R., in that the court did not instruct that evidence of prior convictions and reputation could be considered only on the issue of intent and not on the issues of character and guilt. Appellant did not not request such an instruction.

Uder Rule 26.02, supra, the trial court is not required to give cautionary instructions on collateral issues when no request is made for such an instruction. State v. McQuerry, Mo., 406 S.W. 2d 624, 629[9]. Specifically, absent a request, the court is not required to instruct the jury as to any limited consideration to be given of former convictions. State v. Meller, Mo., 382 S.W. 2d 671, 674[3].

Appellant's Point IX is a further complaint on the court's ruling with respect to the shotgun, Exhibit 20, received in, and permitted to be withdrawn from, the evidence. He contends the court's admonitions were insufficient and that a mistrial should have been declared.

When the court permitted the state to withdraw the shotgun, the defendant moved for a mistrial for the reason it had been previously exhibited and was the subject of testimony from Sheriff Hemphill. The court denied the

mistrial, after which the defense asked that the jury be instructed that the gun had been withdrawn and to "disregard any evidence of it." The court then instructed the jury that the gun had "been withdrawn as evidence in this case and you're instructed to disregard it."

The motion for mistrial called for an exercise of the court's discretion and, in an exercise of that discretion, the court instructed the jury to disregard the evidence. By its order, the court, in the context of this case, "eliminated any possible prejudice in the minds of the jury." State v. Neal, Mo., 416 S.W. 2d 120, 124[7, 8]; State v. Russell, Mo., 395 S.W. 2d 151, 155[4]. State v. Nolan, Mo., 423 S.W. 2d 815, 818-819[11-14].

Appellant's Points III, VIII, X and XI go to the sufficiency of the evidence. Under Point III, he charges that the burglary tools should have been excluded because they were not connected to him; under Points VIII, X, and XI, he charges he should have had an acquittal because the evidence failed to show that he had possession or custody of the tools in Seligman on July 18, 1968. He argues that his arrest at a point several miles away is too remote to permit an inference of custody and possession of tools in Seligman. He also argues that there was no showing that he drove or rode in his automobile to Seligman which circumstances did produce an acquittal in United States v. Wing, D.C. W.D. Mo., 302 F. Supp. 1247. That result is not conclusive here because the charge there was transportation of a firearm in interstate commerce and the crucial fact for proof would be possession of the firearm while crossing a state line.

When the evidence is viewed in the light most favorable to the state, State v. Watson, Mo., 350 S.W. 2d 763, 766[1], State v. Wishom, Mo., 416 S.W. 2d 921, 923[1], it cannot be said as a matter of law that the evidence is not sufficient to sustain the judgment of conviction. Criminal Rule 26.10, V.A.M.R. The statement recites evidence from

which it could be inferred: that in the early morning of July 18, 1968, two men attempted to burglarize the Bank of Seligman; that the physical features of one of the men were those of defendant; that the two were seen to get into a blue 1968 Grand Prix Pontiac automobile bearing Oklahoma license plates; that the automobile returned shortly to the bank and the two men got out; that two men were at the bank attempting to reach the burglary alarm, one standing atop two concrete flower boxes, the other on the ground steadying him; that when an attempt was made to apprehend the men, they fled the scene on foot leaving behind a sledge hammer, wrecking bar, and pliers; that within ten minutes the automobile was found abandoned approximately 1000 feet from the bank; that the car belonged to defendant and contained numerous burglary tools; that defendant was found later the same day within seven miles of the scene sitting in a weedy ditch; that defendant's home was in Bartlesville, Oklahoma; that he had a reputation as a burglar.

Appellant charges that the use of witness Moran who identified defendant by his physical features "constituted a suppression of, or failure to disclose, evidence in the possession or control of the prosecution favorable to the defendant * * *." The unsupported argument is that the witness had been impeached in federal court and had told conflicting stories; that the prosecution used this witness, vouching for him, all the while knowing of the conflict; that the effect of his testimony was to cause the jury to speculate that defendant was a participant in the attempted burglary of the bank.

A witness is always subject to impeachment but use of such a witness does not constitute suppression of, or failure to disclose, evidence. This is particularly so in this case because the defense was fully aware of all testimony given by witness Moran in the federal court and the state had even entered into a stipulation with the defense with respect to known inconsistencies.

Finally, appellant claims that the punishment assessed is excessive and resulted from these "unduly prejudicial and inflammatory matters." The punishment and sentence are within the limits provided by statute, Section 560.115, supra, and the assigned errors are shown to be without merit. Consequently, there is no excessiveness in the judgment. State v. Kirkpatrick, Mo., 428 S.W. 2d 513, 517[5-7].

Judgment affirmed.

Andrew Jackson Higgins, Commissioner

Houser, C., concurs.
Welborn, C., concurs

PER CURIAM: The foregoing opinion by Higgins, C., is adopted as the opinion of the court. Seiler, P. J., Holman, J., Henly, Alternate Judge, concur. Bardgett, J., not participating because not a member of the Court when the case was submitted.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, SOUTHWESTERN DIVISION

Filed Dec. 20, 1968

2592

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ERNEST L. EDMONDSON and HERMAN E. WING,
Defendants.

MEMORANDUM AND ORDER SUSTAINING DEFENDANTS' MOTION FOR JUDGMENT OF ACQUITTAL

This matter is presently before the Court on the defendants' motion for a judgment of acquittal.

Defendants were charged with attempted bank burglary of the Bank of Selegman, Missouri during the early morning hours of July 18, 1968. The defendants were tried by a jury on November 13, 1968, and were found guilty.

In their motion the defendants contend that the Court erred in denying their motion for acquittal made at the conclusion of the evidence; that the verdict is contrary to the law; that the verdict is contrary to the evidence; and that the evidence is insufficient as a matter of law to connect the defendants with the alleged crime.

There was evidence introduced at the trial that the two men surprised in the process of burglarizing the bank were somewhat similar in physical appearance to the two defendants. However, no government witness had seen the faces of the burglars or could give a positive identification as to the defendants. The testimony as to the clothing the burglars were wearing and the clothing defendants

had on at the time they were apprehended was also contradictory. The defendant Wing's car was found approximately 1000 feet from the bank later that morning. However there was no evidence that Wing was driving the car during this period of time. A government witness, Bill Moran, a young boy of 15 or 16, testified that this car had been driven up to the bank earlier that morning before the attempted burglary, and that two men got out. However, this testimony was impeached by a prior inconsistent statement Moran had given to the F.B.I. in which he stated that he did not know the make or model of the car that had pulled up to the bank. Defendant Edmondson was apprehended about two and one-half miles from the bank, and defendant Wing was apprehended eight miles from the bank.

It is a fundamental principle of our criminal law that the guilt of a defendant must be established beyond a reasonable doubt, and that the verdict must be based upon substantial evidence. Substantial evidence is more than a scintilla. It means such relevant evidence as a reasonable mind might accept to support a conclusion. It is evidence affording a substantial basis of fact from which the fact in issue can be reasonably inferred. See: United States v. Martin, 375 F. 2d 956 (6th Cir. 1967).

The finding of the automobile of one of the defendants some 1,000 feet from the bank, a physical similarity between the burglars and the defendants, and the apprehension of the defendants within two and one-half and eight miles of the bank is not sufficient evidence to permit or support a finding beyond a reasonable doubt that the defendants were guilty of the burglary.

Since the evidence is not sufficient to make a submissible case, and since it is not sufficient to support a finding of guilt beyond a reasonable doubt, the motion for

judgment of acquittal is hereby sustained as to both defendants, and judgment is hereby entered for the defendants, Ernest L. Edmondson and Herman E. Wing, and against the United States of America.

IT IS SO ORDERED.

ELMO B. HUNTER
Judge

Attest: A true Copy, J. (Illegible), Clerk

By E. R. Crocker, Deputy (Seal)